

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

**OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041**

November 22, 2000

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA), on behalf	:	Docket No. SE 2000-39-D
of Terry McGill,	:	BIRM CD 99-04
Complainant	:	
	:	
v.	:	
	:	Oak Grove Mine
U.S. STEEL MINING COMPANY, LLC.,	:	Mine ID 01-00851
Respondent	:	

DECISION

Appearances: William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, Birmingham, AL, for the Complainant;
Anthony Jeselnik, Esq., U.S. Steel Mining Company, Pittsburgh, PA, for the Respondent.

Before: Judge Weisberger

This case is before me based on a Complaint filed by the Secretary of Labor ("Secretary") alleging that U.S. Steel Mining Company ("U.S. Steel") discriminated against Terry McGill in violation of Section 105 of the Federal Mine Safety and Health Act of 1977 ("the Act"). A hearing on this matter was held in Hoover, Alabama, on August 23, 2000. On October 31, 2000, the Secretary filed findings of fact and a post trial brief. On November 1, 2000, U.S. Steel filed proposed findings of fact and post hearing legal argument.¹ On November 15, 2000, U.S. Steel filed a reply brief.

¹On October 16, 2000, the Secretary filed a Motion Seeking Reconsideration of numerous evidentiary rulings made at the hearing of this matter.

At the hearing U.S. Steel had objected to introduction, by the Secretary, of various exhibits and the objections were sustained. The basis for each of the rulings was set forth in the record of this matter, and need not be reiterated. I have evaluated the motion filed by the Secretary, but find there is no need to reconsider the initial rulings set forth in the record. Accordingly, the motion to reconsider is denied.

I. The Secretary's Case

Terry McGill, who is presently a retired miner, previously worked as a roofbolter for U.S. Steel. According to McGill, his first contact with Carl Harless, a foreman employed by U.S. Steel, occurred in April 1999 when Harless, who was not McGill's foreman at that time, noted that an underground miner had taken his hat off, and had turned his light off. According to McGill, Harless fired that miner. McGill confronted Harless and told him that if he would fire every miner at the mine who would be found with his hat or light off, he (Harless) would be busy, as this practice is widespread.

Subsequent to April 1999, McGill injured his knee at the mine and was off work for 13 weeks. When McGill returned on June 21, 1999, Harless had become his foreman. Sometime thereafter, Harless told McGill and Jerry Norris, McGill's co-bolter on the section, that since he now had two committeemen on the section, he was outnumbered, and should probably "start wearing a tape recorder". (Tr. 45.) According to McGill, Harless "... kept trying to goad me into something or get me to act". (Tr. 45.)

According to McGill, on July 13, 1999, the section's continuous miner was cutting a crosscut from the No. 3 entry to the No. 2 entry. McGill testified that on his way to lunch he passed the No. 2 entry, and saw that it had not been pinned all the way to the face. He indicated that this entry was 20 feet wide, and that at the face along the right side of the entry, the last row of bolts was approximately seven feet from the face. In contrast, on the left side of the entry the last row of bolts was approximately ten feet from the face.²

McGill went to see Luther C. Self, the miner operator, and asked him if he was going to cut all the way through to entry No. 2, and Self indicated in the affirmative. McGill told Self that if he were to cut into the No. 2 entry, he would then be cutting into an area that was not completely pinned. Self told him that Harless had told him (Self) to cut the crosscut through to the No. 2 entry. McGill then went to see Harless and asked him if he was going to cut through to the No. 2 entry, and the latter indicated in the affirmative. McGill then testified that he told Harless as follows: "... you know you will be cutting into a place that is not completely pinned". (Tr. 55.) According to McGill, Harless said that "it was his f...ing section and he would run it like he wanted to and for us to get our g-d damn butts out there and eat." (Tr. 55.)

At approximately 10:30 a.m., while at the dinner hole, McGill asked MSHA Inspector Bud Norris, who was present that day conducting an inspection, whether the law would be violated if a cut would be taken "... and it [was] not bolted up all the way". (Tr. 59.) According to McGill, the inspector asked if such a cut had already been taken, and McGill indicated that it had not. The inspector did not say anything further to McGill on this subject.

²On June 11 or June 12 when McGill bolted the face of the No. 2 entry, he asked Harless why he had not had the area "squar[ed] up" (Tr. 218) so it could be pinned properly, and Harless responded by saying that it was his "f---ing section ... and he'll run it like he wanted to". (Tr. 219.)

Harless was located one to two crosscuts away from the dinner hole during the conversation between McGill and the inspector. According to McGill, Harless observed him talking to the inspector. McGill indicated that Harless then entered the dinner hole, and asked the inspector what he was inspecting, and the inspector said he was inspecting a belt. Harless then left, and McGill continued talking to the inspector.

According to McGill, at approximately 11:00 a.m., after he had left the dinner hole, he met the miner crew going into the dinner hole, and asked them if they had cut through to the No. 2 entry. Self told McGill that Harless told them to get the miner out of the entry, and to stop cutting in that area.

Thereafter, McGill went to the No. 3 entry with Norris to resume bolting, at which point Harless told him to get some curtains from the tail track area, and to bring them back to the section. The curtains were located approximately 180 feet from the section. McGill indicated that the curtains which weigh approximately three pounds each, but were “bulky” (Tr. 68), are usually transported by a miner via a scoop. He indicated that the floor of the walkway, from the tail track to the section, sloped downhill and contained mud that was more than ankle deep and generally consisted of “rough terrain”. (Tr. 66.) McGill testified that he asked Harless if he could use a scoop, and Harless responded as follows: “Look, I told you to walk out there and get it. Are you violating a direct work order”? (Tr. 67.) McGill indicated that he told Harless that he would get the curtains,³ but that “... it may take me some time” (Tr. 67.) McGill took one curtain to the section, returned to the tail, and put another curtain on his shoulder, intending to take it to the section. Harless approached him and told him to put the curtain down and for him and Norris to bolt the No. 3 crosscut. Harless then offered to carry the rest of the curtains. McGill testified that he told Harless that if he would carry the curtains, then he (McGill) would file a grievance, as Harless would be performing “classified” work. According to McGill, Harless then said to him as follows: “... you little son of a b---h, I’m going to show you something about what’s right and what’s wrong.” (Tr. 73.) According to McGill, Harless was “really cussing”. (Tr. 73.) McGill told Harless that if he would continue cursing that he (McGill) would get Hank Keaton, the mine committee chairman, to be a witness. Harless then told him that he (McGill) did not need Keaton to be a witness because he (McGill) “was a f---ing committeeman.” (Tr. 74.) McGill said that Harless then began to run at him with his fist drawn, and said that “you not going nowhere.” (Tr. 74.) McGill told Harless that he was getting Keaton and started to walk away, at which point Harless said that he was insubordinate and “you’re a fired son of a b---h”. (Tr. 75.) Harless further told him that “the time is 11:46 ... [y]our time stops now.” (Tr. 75.) In response, McGill told him that he was calling Mike Sumpter, a management official, and started to go to get him. Harless then called him (McGill) insubordinate, told him that he was fired, and that he (Harless) would get Sumpter. Harless then got Sumpter, who arrived at the scene and asked what was going on. McGill said that he did nothing, and he went outside accompanied by Harless and Sumpter.

³According to McGill there was about a dozen curtains to transport.

Self testified that on July 13, he was told by Harless to cut the crosscut between the No. 2 and No. 3 entries. (Tr. 92.) After Self took only a 35 foot cut, Harless told him to back the miner out, and shut it down.⁴ According to Self, in normal operations the miner takes a 40 foot cut, and that it is not the normal practice to stop a miner after only a 35 foot cut in order to fix a suction hose. Self indicated that when he was told by Harless to remove the miner and shut it down, he had not experienced any difficulty operating the miner, that it had been operating properly, and that there was no indication that it was losing oil. Self conceded that a hose on the miner that is used to siphon oil to the miner was broken. However, he opined that as the hose was not pressurized, it did not have any effect on the operation of the miner.

After stopping the miner, Self left the area to go to the dinner hole.

Timothy Lynn Bynum, Self's helper, testified that Harless did not tell him the reason for having to back the miner out on July 13. He confirmed that he had not observed any problems with the hydraulic tramming of the miner, nor did he experience difficulty raising or lowering the cutting head. He also confirmed that the offset had not been bolted. He did not recall Harless saying that the suction hose had to be fixed. On cross examination, he indicated, in essence, that he was not sure who had informed Harless that they were cutting into an unpinned area, but that, in response, Harless was not angry nor did he issue any threats.

Jerry A. Norris, a roofbolter, was McGill's partner on the bolter during the dates in issue. He confirmed that Harless said that since he had two committeemen "... and an a--hole" (Tr. 139) he needed to carry a tape recorder.

According to Norris, on July 13, McGill asked Harless if he was going to cut a crosscut between the No. 2 and No. 3 entries, and Harless indicated, in the affirmative. Norris testified that he told Harless that cutting into an unpinned area is illegal. According to Norris, Harless said "it was his f---ing section; he'd run it any f---ing way he wanted to." (Tr. 141) and Harless then told Norris and McGill "to eat [their] goddamn lunch" (Tr. 141).

Later on in the day, Norris was assigned to build curtain drops. He asked Harless where the curtains were coming from, and the latter told him that McGill would bring them "if he wasn't too f---ing crippled." (Tr. 143) Norris testified that later on, when Harless told him to get the curtains, he used a scoop to get the curtains with Harless' knowledge.

On cross examination, Norris indicated that on July 12, the No. 2 entry had not been completely bolted. He explained that rocks on the floor of the entry had prevented the roofbolter from advancing further inby along the right side of the entry. As a result, the inby right side of the entry was more than 5 feet from the last row of bolts. Norris indicated that the unbolted area was the area that would be cut from the No. 3 entry. According to Norris, at the end of the shift, on July 12, he informed Harless that they would not be able to pin all the way to the face due to

⁴The following day, July 14, Self cut into the No. 2 entry.

uncut bottom.

Rex Tanner, the president of the local union, and a member of the mine committee, was with the inspector in the dinner hole on July 13. According to Tanner, after Harless arrived at the dinner hole he introduced himself to the inspector, and asked him what the problem was, and the inspector explained that if a cut would be taken through to an unpinned area there would be a violation. At that point, Harless turned and went to the face where the subject cutting was being done.

II. U.S. Steel's Case

Rick Nogosky, the superintendent at the site, testified that he made the decision to fire McGill, and that he was solely responsible for the firing. He indicated that he made that decision after the 24-48 union hearing related to the stopping of McGill's time by Harless. He explained that his decision was to "uphold" (Tr. 239) the discharge of McGill.⁵

Nogosky indicated that on two separate occasions he had heard McGill say f--k you to two supervisors.

Nogosky opined that an oil leak in a miner could occur suddenly, and would result in a malfunction in the miner's capacity to lower or raise the cutting head.

Harless testified that on July 13, at approximately 10:00 a.m., McGill wanted to know if he would cut from the No. 3 crosscut to the No. 2 entry, and he (Harless) indicated in the affirmative. McGill responded by stating that this could not be done, as the area was unsupported. Harless testified that, in response, he told McGill that it was supported and invited him to observe it. McGill did not go, but instead went to the crosscut between the No. 2 and No. 3 entries, where the miner was located. Harless said that the unbolted area was in the offset inby the end of the No 2 entry perpendicular to the crosscut between the No. 2 and No. 3 entries. He indicated that the appropriate plan required bolting to be performed within five feet of the face. In contrast, in the offset, the distance from the last row of bolts to the face was seven feet. He indicated that the height from the ceiling to the floor was four feet in that area, whereas the normal distance was six feet. He explained that in cutting through the crosscut from the No. 3 entry to the No. 2 entry, the miner would not have entered this offset area, as it was perpendicular to the cut. He indicated that on July 15, when the cut was taken from the crosscut into the No. 2 entry, Inspector Norris was present, but he did not criticize this action, nor was it cited.

Harless testified that the area in the No. 2 entry, in a direct line inby of where the miner

⁵Nogosky testified that in deciding to fire McGill, he relied on the stories presented by Harless and McGill at the 24-48 hearing, and also his review of their personnel files. In contrast, in his deposition he testified that he relied on Harless' testimony, the nature of the events, and nothing else.

was cutting in the crosscut between the No. 2 and No. 3 entries, was bolted by 10:00 a.m. on July 13, as McGill and Norris had bolted that area on July 12. There was a conflict in Harless's testimony regarding the time during the morning of July 13, when Self backed the miner out from the crosscut in which he was cutting, trammed it to the No. 3 entry, and yelled at him (Harless) that the miner had busted a hose and needed oil. Initially, Harless said that this conversation occurred at approximately 12:00 p.m.. However, later on in his testimony, he indicated that the time of 12:00 p.m. was not correct, but that he was sure of the following sequence of events: that (1) after he had this conversation with Self, and after Self had backed the miner out by from the crosscut between the No. 2 and No. 3 entries, he saw the inspector in the dinner hole on a bench with Norris and McGill, and (2) that 30 minutes after he had the conversation with Self, he observed and lifted eight empty cans of oil that were in close proximity to the miner.

Harless testified that at approximately 11:30 a.m., on July 13, after he told McGill to get some curtains from the tail area, he approached the tail and saw McGill carrying only one curtain under his arm. Harless said to him "... let me get some of these for you and help you carry them up there". (Tr. 408.) McGill responded by telling Harless that if he touched one piece he (McGill) would file a grievance. Harless indicated that he was upset because McGill had been carrying only one curtain. Harless told McGill, who had continued walking in by, to stop as he wanted to tell him what to do for the rest of the shift. According to Harless, McGill said, f--k you, and that he was doing what I had told him. Harless again told McGill to stop, and told him that he needed for him to know what to do for the rest of the shift. According to Harless, he told McGill to stop two more times and both times McGill said, in response, f--k you. Harless told McGill that he was bordering on insubordination and McGill said get f---ed. Harless then told McGill to stop, and intending to fire him, told him "I'm stopping your time". (Tr. 413.) Harless next told McGill to sit down, and then he went to get Sumpter. Harless said that he reported this incident to Nogosky, and recommended that McGill be fired.

Harless indicated that he had not been concerned when he saw McGill and Norris with the inspector, as people speak to inspectors all the time. In essence, he said that the only time that he got angry was when he saw McGill carrying only one curtain.

III. Discussion

A. Case Law

The Commission, in *Braithwaite v. Tri-Star Mining*, 15 FMSHRC 2460 (December 1993), reiterated the legal standards to be applied in a case where a miner has alleged that he was subject to acts of discrimination. The Commission, *Tri-Star*, at 2463-2464, stated as follows:

The principles governing analysis of a discrimination case under the Mine Act are well settled. A miner establishes a prima facie case of prohibited discrimination by proving that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary*

on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2797-800 (October 1980), rev'd on other grounds, sub nom. Consolidation Coal Co., v. Marshall, 663 F.2d 1211 (3rd Cir. 1981); *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action in any event for the unprotected activity alone. *Pasula*, 2 FMSHRC at 2800; *Robinette*, 3 FMSHRC at 817-18; see also Eastern Assoc. Coal Corporation, v. United Castle Coal Co., 813 F.2d 639, 642 (4th Cir. 1987).

B. The Secretary's Prima Facie Case.

1. Protected activities

It is not contested that on the morning of July 13, the most inby portion of the No. 2 entry had not been cut to an equal depth across the entire width of the entry, due to a low ceiling resulting from rock build-up on the floor. As a result, the right side of the entry was not bolted within five feet of the face. Similarly, U.S. Steel did not rebut or contradict McGill's testimony that on July 13 he had communicated both to Harless, his immediate supervisor, and MSHA Inspector Norris, his concern that if Self would complete the crosscut between the No. 3 and No. 2 entries and continue into the No. 2 entry, he would then be cutting into an unbolted area.

Section 105(c) sets forth the following language regarding activities that are protected under the Act: "[making] a complaint notifying ... the operator's agent ... of an alleged danger or safety violation in a coal ... mine" The Legislative History of the Act manifests Congress' intent that Section 105(c) be given a broad construction. S. Rep. No. 95-181, 95th Cong., 1st Sess., at 35 & 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978) ["Leg. Hist."] cited with approval in Pasula, supra at 2791 - 2792) Thus, broadly construing Section 105(c), I find that McGill's communications of safety concerns to Inspector Norris and to Harless are protected under the Act. Accordingly, I find that it has been established that on July 13, McGill did engage in protected activities.

2. Adverse action.

The record unequivocally establishes that on July 13 Harless, after a confrontation with McGill, stopped his (McGill's) time, and intended to fire him permanently. Harless' action in stopping McGill's time led directly to a 24-48 hearing, which was a union mandated first step in the grievance disciplinary process. Further, according to McGill, and not subsequently contradicted by Harless, the latter had told him, at the confrontation on July 13, that he was

“fired”.⁶ Thus I find that it has been established that U.S. Steel took action adverse to McGill.

3. The Adverse Action Was Motivated “in Any Part” by McGill’s Protected Activities.

Harless, who took the action adverse to McGill on July 13, testified, in essence, that he had not gotten angry when McGill told him, on the morning of July 13, not to cut into the No. 2 entry because it was unsupported, and he was not concerned when he saw McGill sitting on a bench with the inspector in the dinner hole, because people speak to inspectors all the time. He explained, in essence, that, in intending to fire McGill and in stopping his time, he was motivated by McGill’s “insubordination”, i.e., refusing to stop when ordered by him (Harless), and cursing at him (Harless). Also, in essence, Harless indicated that on July 13, he got angry only when he saw McGill carrying one curtain.

However, I take cognizance of the following uncontested facts: that at approximately 10:30 a.m., on July 13, McGill told Harless that if he would cut from the entry No. 3 through to entry, No. 2 entry, he would be cutting into a place that was not completely bolted; that shortly thereafter McGill asked Inspector Norris, at the dinner hole, whether there would be a violation if a miner would cut into a place that had not been completely bolted; that Harless observed McGill sitting next to the inspector on a bench in the dinner hole; and that at 11:26 a.m. that same day, Harless, intending to fire McGill, permanently stopped his time. Also, I note that Harless did not specifically rebut McGill’s testimony that on July 13, when he told him that he would be cutting into a place not completely bolted, Harless said it was his f---ing section and he would run it like he wanted to. Thus, primarily based upon the coincidence in time between (1) McGill’s protected verbal communication to Harless, which was accompanied by some evidence of animus on the part of Harless, followed shortly thereafter by Harless observing McGill talking to the inspector; and (2) Harless’ firing of McGill less than an hour later, I find that the Secretary has established that Harless’ adverse action taken against McGill was motivated “in any part” by McGill’s protected activities.

IV. U.S. Steel’s Defense

I take cognizance, as discussed above, of the existence of some evidence of some degree of animus by Harless towards McGill regarding the latter’s protected activities under the Act. However, it is significant to note that Bynum, Self’s helper on the miner, testified that when it was brought to Harless’ attention that they would be cutting into an unpinned area, Harless was not angry and did not issue any threats. Indeed, the record does not contain any evidence of any animus by Harless, or adverse action taken by him directed against either Bynum or Self, the miner operator. In the same fashion Norris, who was McGill’s partner on the bolter, testified that he told Harless that “... you’re cutting into an unpinned place, such as Terry also said. And this is

⁶Subsequently, Rick Nogosky, the superintendent at the mine made a decision after the 24-48 union hearing to uphold Harless discharge of McGill.

illegal,” and Harless stated that “... it was his f---ing section; he’d run it any f---ing way he wanted to.” (Tr. 141.) Later, Harless observed both McGill and Norris sitting with the inspector in the dinner hole. However, significantly, there is no evidence in the record that Harless directed any animus toward Norris or took any adverse action against him as a consequence of his having heard Norris express safety concerns, and having observed him talking to the inspector.

Further, most significantly, although Harless’ action adverse to McGill shortly followed McGill’s protected activities, i.e., voicing safety concerns to Harless and the inspector, it was McGill’s actions that were not protected under the Act, i.e., threatening to file a union grievance, that were immediately followed by Harless’ stopping his time. Additionally, according to McGill, Harless’ cursing him and telling him that “you’re a fired son of a b---h, ... your time stops now”, immediately followed McGill’s statement to Harless that he was going to get the mine committee chairman, Hank Keaton. It is not for this forum to decide whether, in the light of this sequence of events and actions, McGill has any redress under the National Labor Relations Act. However, considering (1) this scenario and sequence of events; (2) testimony of Norris and McGill regarding Harless’ previous statements to them expressing displeasure with having union members on his section and; (3) the unrebutted testimony of Harless, whose demeanor I observed and found to be truthful in his testimony on this point, that McGill refused to stop walking away when ordered to do so by Harless, I find that although Harless’ adverse action taken against McGill on July 13 was motivated in any part by McGill’s protected activities, Harless would have taken the adverse action against McGill, based on McGill’s actions that are not within the perview of those protected by the Act. Accordingly, I find that U.S. Steel has prevailed in its affirmative defense. Within the above framework of evidence, I conclude that the Secretary has not established that U.S. Steel discriminated against McGill in violation of Section 105(c) of the Act.

ORDER

It is **ORDERED** that the Complaint filed in this case be **DISMISSED**, and that this case

be **DISMISSED.**

Avram Weisberger
Administrative Law Judge

Distribution: (Certified Mail)

William Lawson, Esq., U.S. Department of Labor, Office of the Solicitor, 150 Chambers Bldg.,
100 Centerview Drive, Birmingham, AL 35216

Anthony Jeselnik, Esq., U.S. Steel Mining Company, Law Department, 600 Grant Street,
Pittsburgh, PA 15219-2749

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